No. 89-6332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT S. MINNICK,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

At the core of this appeal is the right of an accused to have his counsel present at a custodial interrogation when he has asked that counsel be there. That such a request was made by Robert Minnick is indisputable: the FBI report itself quotes Minnick as requesting his lawyer's *presence* at any reinterrogation (Minnick "stated that he would make a more complete statement [on Monday] with his lawyer present" (JA 16)).[1] Nor can any serious argument be offered that Minnick

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[1] Mississippi seeks to transform Minnick's statement to the FBI that he would speak further with them with his counsel present into an open-ended "invitation" to the "authorities to come and speak with him again [which] Deputy Denham accepted" (Brief of Respondent, "Miss. Br.," at 34). As Mississippi recognizes elsewhere, however, the "invitation" was predicated on having Minnick's attorney present (Miss. Br. at 23).

reinitiated discussions with the authorities: the record is plain, and the Mississippi Supreme Court has held, that "[w]hen Denham arrived at the jail, the jailers told Minnick that he would have to go down and talk with Denham" (JA 74; *see also* 45).

Because it is undeniable that Minnick: (a) asked for counsel when the FBI interrogated him (JA 15-16); (b) stated that he would speak again with the authorities "with his lawyer present" (*id.*); and (c) was required to meet with Deputy Denham without his counsel present after his jailers told him that he was obliged to "talk" with Denham (JA 45, 47, 74), the question thus posed is whether, under these circumstances, it can possibly be deemed consistent with this Court's ruling in *Edwards v. Arizona*, 451 U.S. 477 (1981) for inculpatory statements allegedly made by Minnick to Deputy Denham to have been introduced against him.

Both Mississippi and the United States, as *amicus curiae*, seek to deal with this question by avoiding it. Mississippi (and the Mississippi Supreme Court ruling it defends) urges that *Edwards* should be read to provide that the police are only required to afford the accused the chance to "consult" with counsel before the State is free to reinitiate interrogation (Miss. Br. at 11-18). The United States' approach is to frame the ultimate issue before the Court as whether the rule of *Edwards* should be "extended" to prohibit the police from reinitiating contact with an accused whose invocation of his right to counsel has been honored (Brief of the United States as *Amicus Curiae* Supporting Respondent, "U.S. *Amicus* Br.," at 8). But the issue here is the far simpler one of whether an accused who has indicated his desire to deal with the police only through counsel – and specifically requested the *presence* of counsel – may be reinterrogated without counsel actually being present and have statements then extracted from him used against him.

The negative answer to that question is not only contained within *Edwards* itself, but also in *Miranda v. Arizona*, 384 U.S. 436 (1966), and has frequently been reiterated in decisions of this Court. In response, the United States argues for a radically new rule – one unsupported by citation to any decision of this Court – that eradicates much of the painstaking work of this Court to assure the implementation of the protections afforded an accused by the Fifth Amendment. The rule would provide that after

an accused invokes his right to counsel and interrogation has ceased, the police may then return – without notice or invitation – to inquire whether the accused has spoken with counsel; if he has, the police may "engage in a second interview if, after again being advised of his/her *Miranda* rights, the accused agrees to waive these rights and speak with the [authorities]" (U.S. *Amicus* Br. at 2 n.1, quoting FBI, *Legal Handbook for Special Agents* § 7-4.1(5) at 84 (1990); *see also* U.S. *Amicus* Br. at 16).[2] There simply is no basis in the precedents of this Court for such a rule. Nor is there any sound policy reason requiring adoption of the United States' proposal to reconsider and re-write the body of the Fifth Amendment precedents in this area.

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[2] We respond throughout this brief to the substantive position of the United States. We note, however, that because Minnick had an attorney, the reinitiated interrogation of Deputy Denham is inconsistent even with the requirements set forth in the FBI's *Legal Handbook for Special Agents:*

> *"If the person being interviewed has already retained counsel, the warning must be that the accused has a right to have that specific person present. Persons under arrest should be specifically asked as to whether counsel has been retained or appointed.* When showing on the FD-395 or the FD-302 (if form is not used) that the warning was given, it must clearly appear that the interviewing Agent advised the accused of his/her right to the presence of his/her counsel already retained, and that the accused voluntarily waived the presence of that person." (*Handbook*, § 7-3.4, at 82.01; emphasis supplied)

Notwithstanding Mississippi's assertion (Miss. Br. at 25 n.7), Minnick was not asked if he had counsel and was not advised that he had a right to have *his* counsel present at the reinterrogation conducted by Deputy Denham (JA 28-29). In fact, Minnick's uncontroverted testimony was that he was told by his jailers that his attorney was "nothing" (JA 47) and that he was obliged, against his will, to meet with and "talk" to Deputy Denham (JA 45, 47).

We also note that, notwithstanding the language in the *Handbook* cited by the United States, the FBI has demonstrated its ability to adhere to the constitutionally compelled norms required by *Edwards*. In *United States v. Halliday*, 658 F.2d 1103, 1104 (6th Cir.), *cert. denied sub nom, Frank v. United States*, 454 U.S. 1127 (1984), for example, a case cited by the United States in support of its new rule, the FBI asked counsel's permission to reinterview his client. In *United States v. Bentley*, 726 F.2d 1124, 1126 (6th Cir. 1984), the FBI Agent contacted the accused's counsel to "arrang[e] a time" to interview the accused. And in this case, the FBI discontinued its interrogation of Minnick when he stated that he wanted counsel's presence and it did not reinitiate contact with him (JA 16).

Mississippi and the United States choose avoidance in response to Minnick's argument that Deputy Denham's interrogation violated his Sixth Amendment rights. The suggestion that Minnick may not argue that his conviction and death sentence offend the Sixth Amendment because the Sixth Amendment was not specifically cited in Minnick's "Question Presented" in his petition for a writ of *certiorari* is not only based upon a tortured misreading of the question — which refers by name to no amendment but fairly encompasses both the Fifth and Sixth Amendments — but wholly ignores Mississippi's previously quite lucid understanding of the scope of the Question Presented in the petition for *certiorari* as raising both Fifth and Sixth Amendment issues.

As for the merits, Mississippi attempts to retreat from its earlier admission — as well as the plain holding of its Supreme Court — that Minnick's Sixth Amendment right to counsel had attached prior to the time of Deputy Denham's interrogation (JA 68, 76). There is no basis for Mississippi's change of position and thus no basis at all for avoiding the force of *Michigan v. Jackson*, 475 U.S. 625 (1986), which requires reversal of the ruling below.

ARGUMENT

I. MINNICK'S CONVICTION WAS OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT

A. *Edwards v. Arizona* Controls This Case And Mississippi's Interpretation Does Not Comport With This Court's Precedents

This Court has consistently held that an indispensable safeguard for the protection of the Fifth Amendment privilege against compelled self-incrimination is the right to have counsel *present* at any custodial interrogation.[3] No decision of this Court supports

[3] *E.g.*, *Arizona v. Roberson*, 486 U.S. 675, 680 (1988) ("[t]he rule of the *Edwards* case came as a corollary to *Miranda*'s admonition that '[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present'"); *Patterson v. Illinois*, 487 U.S. 285, 291 (1988) (accused's right to communicate with police only through counsel is the "essence of *Edwards* and its progeny"); *Michigan v. Jackson*, 475 U.S at 629 ("[t]he Fifth Amendment protection against compelled self-incrimination provides the right to *(Footnote continued)*

the argument that, once an accused facing custodial interrogation has invoked the right to counsel and sought counsel's presence, anything other than counsel's actual presence is sufficient to protect the Fifth Amendment privilege.[4]

Deputy Denham's reinterrogation of Minnick after Minnick invoked his right to have counsel present violated the *Edwards* rule. To avoid *Edwards*' bright-line proscription, Mississippi must

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counsel at custodial interrogations"); *Moran v. Burbine*, 475 U.S. 412, 423 n.1 (1986) (Fifth Amendment right to counsel requires police to "honor his request that the interrogation cease until his attorney is present"); *Shea v. Louisiana*, 470 U.S. 51, 52 (1985) ("[i]n *Edwards v. Arizona*, . . . this Court ruled that a criminal defendant's rights under the Fifth and Fourteenth Amendments were violated by the use of his confession obtained by police-instigated interrogation — without counsel present — after he requested an attorney"); *Solem v. Stumes*, 465 U.S. 638, 646 (1984) ("[b]efore and after *Edwards* a suspect had a right to the presence of a lawyer"); *Oregon v. Bradshaw*, 462 U.S. 1039, 1043 (1983) (plurality) (Op. of Rehnquist, J.) ("[i]n *Edwards* . . . [w]e held that subsequent incriminating statements made without his attorney present violated the rights secured to the defendant by the Fifth and Fourteenth Amendments"); *Edwards v. Arizona*, 451 U.S. at 485 ("*Miranda* itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, 'the interrogation must cease until an attorney is present.' Our later cases have not abandoned that view"); *Rhode Island v. Innis*, 446 U.S. 291, 297 (1980) (Fifth Amendment privilege against compelled self-incrimination includes the *Miranda* warning "'that he has the right to the presence of an attorney'"); *Fare v. Michael C.*, 442 U.S. 707, 719 (1979) (*Miranda* held that "'the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege'"); *Michigan v. Mosley*, 423 U.S. 96, 104 n.10 (1975) (*Miranda* "distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that 'the interrogation must cease until an attorney is present' only '[i]f the individual states that he wants an attorney'"); *Miranda v. Arizona*, 384 U.S. at 474 ("[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present").

[4] Minnick's conviction may be reversed without addressing the reconsideration of the *Edwards* rule urged by Mississippi and the United States. Itself sufficient is the Mississippi Supreme Court's factual finding that when Deputy Denham appeared at the San Diego jail "the jailers told Minnick that he would have to go down and talk" (JA 74; *see also* 45). *Edwards v. Arizona*, 451 U.S. at 490 (Powell & Rehnquist, JJ., concurring) (when a suspect is "taken from his cell against his will and subjected to renewed interrogation . . . it clearly was questioning under circumstances incompatible with a voluntary waiver of the fundamental right to counsel"). This critical fact of coercion is never adverted to by Mississippi or the United States.

demonstrate that Minnick "initiated" communications with the authorities. 451 U.S. at 485, 486 n.9. That Mississippi simply cannot do in a case in which Deputy Denham went to the San Diego County jail to interrogate Minnick who, in turn, was told by his jailers (as the Mississippi Supreme Court concluded) "that he would have to go down and talk to Denham" (JA 74; *see also* 45; Miss. Br. at 25). This case is thus in stark contrast to ones in which the police and the accused were already in the other's presence and difficult issues were raised as to who "reinitiated" communications. *Compare Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983) (plurality) (Op. of Rehnquist, J.) (conversation occurred after the accused invoked his right to counsel while being transferred from the police station and after his attorney gave the police permission to do so).

Here the record supports no conclusion other than that Deputy Denham reinitiated the interrogation of Minnick and that in doing so he violated Minnick's Fifth Amendment rights.[6]

B. The New Rule Proposed By The United States Is Without Independent Support And Would Eliminate Bright-Line Rules Of This Court

Rather than accept the outcome prescribed by *Edwards*, the United States proposes a new Fifth Amendment prophylactic rule based on unsupported assumptions. The United States urges this Court to read the heart out of *Edwards* by permitting the police to reinitiate interrogation of an accused who has specifically requested the presence of counsel but has, when the reinterrogation

[6] Given *Edwards*, issues of waiver need not be addressed by this Court. Contrary to Mississippi's assertion (Miss. Br. at 9), however, there was no holding below that Minnick made a knowing, intelligent and voluntary waiver of his Fifth Amendment rights (JA 75-76). Mississippi argues that Minnick's subjective intent *not* to waive his rights (as illustrated by his mistaken belief that if he did not sign a waiver of rights form nothing he said could be used against him (Miss. Br. at 35-36)) should be translated into a finding that an effective waiver was made (Miss. Br. at 31-36). The law is to the contrary. *E.g., Edwards v. Arizona*, 451 U.S. at 482 ("waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege" to be decided in each case depending on the subjective characteristics and intent of the accused); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (waiver requires "an intentional relinquishment or abandonment").

occurs, previously consulted with counsel who is not actually present. Once an accused has merely spoken with counsel, the United States suggests, "the potentially coercive pressures of custodial interrogation are dissipated" (U.S. *Amicus* Br. at 6).

The assumptions underlying the United States' proposed new rule have been previously made to and rejected by this Court. Counsel's presence, this Court has repeatedly emphasized, is essential to protect the Fifth Amendment privilege against self-incrimination.[6] This Court has recognized that the custodial environment "is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation." *Miranda v. Arizona*, 384 U.S. at 457.[7] The coercive atmosphere of custodial interrogation exists therefore not because an accused has not spoken with counsel but because counsel is not present to offset the threatening power of the state. *See Rhode Island v. Innis*, 446 U.S. 291, 299 (1980). This Court long ago recognized the significant difference between mere consultation and the presence of counsel in safeguarding the Fifth Amendment privilege:

> "Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel

[6] Minnick's clear declaration that he wanted his attorney "present" (JA 16) for any interrogation is not subject to interpretation. An accused's invocation of his *Miranda* rights must be read literally both by the police and by reviewing courts and the plain meaning of the accused's invocation governs. *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) ("[i]nterpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous").

[7] *Illinois v. Perkins*, 110 S. Ct. 2394, 2397 (1990), reiterated that custodial interrogations produce "'inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely'" (*quoting Miranda v. Arizona*, 384 U.S. at 467). *Perkins* recognized that the essential ingredient of "police-dominated atmosphere" is "'privacy – being alone with the person under interrogation,'" *id. (quoting Miranda v. Arizona*, 384 U.S. at 449), because "[q]uestioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will." 110 S. Ct. at 2397.

present during any questioning if the defendant so desires." *Miranda v. Arizona*, 384 U.S. at 470 (citation omitted).[8]

No decision of this Court suggests that the inherently coercive atmosphere of custodial interrogation is dissipated by prior consultation with counsel. Minnick was immersed in a coercive atmosphere, his previous request for his counsel's presence ignored (JA 45, 74), his counsel demeaned by his jailers (JA 47), and his express desire not to meet with Deputy Denham given no effect (JA 45). To suggest, as the United States does (U.S. *Amicus* Br. at 6, 9, 10, 11, 13), that the coercive atmosphere of interrogation is dissipated in these circumstances simply because Minnick previously met with counsel and was given a new set of *Miranda* warnings disregards the very concerns which motivated this Court to establish the *Edwards* bright-line rule.[9]

Adoption of the new rule proposed by the United States would hardly provide the lower courts or the police with a "bright-line" rule. No concrete limitations are proffered and nothing in the rule supplies a basis for judging the appropriateness of the number of reinitiations, the conduct of the officers, or the extent of the coercion. Under this rule the question of how many times and the circumstances under which the prosecution may seek to extract a statement is unclear, and would predictably be the subject of new and extensive *in limine* hearings – *"Minnick"* hearings, we suppose – on an issue which now requires practically none. Significantly, this Court has consistently held that the probability of an effective waiver in the absence of counsel is slim once the accused has explicitly stated his desire to have counsel present. *See, e.g., Michigan v. Mosley*, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring) ("the accused having expressed his own

[8] *See also Arizona v. Mauro*, 481 U.S. 520, 529-30 (1987) (*Miranda* and *Edwards* prevent "government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment"); *Fare v. Michael C.*, 442 U.S. at 719 (right to have counsel present is based on the "special ability of the lawyer to help the client preserve his Fifth Amendment rights").

[9] This Court has specifically stated that new *Miranda* warnings will not "'reassure' a suspect who has been denied the counsel he has clearly requested that his rights have remained untrammeled." *Arizona v. Roberson*, 486 U.S. at 686.

view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a decision without counsel's presence may properly be viewed with skepticism"). Few admissible confessions are, therefore, likely to result from the proposed new rule.

The rule offered by the United States would thus eviscerate not only an accused's right to the presence of counsel but the benefits of the bright-line rules establishing the prophylaxis of protections for an accused's Fifth and Sixth Amendment rights.[10] Those benefits have been genuine. The *Edwards* rule, as routinely applied by the police and the courts, has had all the predictable advantages of a bright-line rule.[11] To our knowledge, since *Edwards* was decided the precise factual scenario in this case has arisen in approximately one reported decision a year.[12] The police have

[10] *E.g., Arizona v. Roberson, supra* (applying *Edwards* bright-line rule to separate investigations); *Michigan v. Jackson, supra* (applying *Edwards* bright-line rule to the Sixth Amendment); *Smith v. Illinois*, 469 U.S. 91, 100 (1984) (*per curiam*) (accused's post-request responses to further interrogation may not be used to cast doubt on the clarity of the initial request).

[11] The United States takes issue with the statement that "'[o]ther courts have generally agreed that *Miranda* and *Edwards* forbid any state-initiated interrogation without counsel present once the accused has requested that counsel act as a medium between him and the government'" (U.S. *Amicus* Br. at 14, *quoting* Pet. Br. at 15 n.12). Minnick has, however, consistently characterized these statements as dictum (*see* Petition for Certiorari at 7 n.6; 8 n.8; 9 n.12; 11 n.13), which makes them no less persuasive as statements of the courts' holdings. This precise issue has *not* arisen frequently for the very reason that law enforcement officers have applied the rule of *Edwards* and *not* reinitiated interrogation after the accused has invoked his right to counsel.

[12] The parties more or less agree that these cases are, on one hand, *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir.), *cert. denied*, 483 U.S. 1010 (1987); *Roper v. Georgia*, 258 Ga. 847, 375 S.E.2d 600, *cert. denied*, 110 S. Ct. 290 (1989); *Iowa v. Newsom*, 414 N.W.2d 354 (Iowa 1987); *Koza v. Nevada*, 102 Nev. 181, 718 P.2d 671 (1986); and, on the other, *United States v. Hall*, 905 F.2d 959 (6th Cir. 1990); *United States v. Halliday*, 658 F.2d 1103 (6th Cir.), *cert. denied*, 454 U.S. 1127 (1981); *South Carolina v. Grizzle*, 293 S.C. 19, 358 S.E.2d 388 (1987), *cert. denied*, 484 U.S. 1012 (1988); *South Dakota v. Cody*, 323 N.W.2d 863 (S.D. 1982). Two of the decisions relied on by the United States support Minnick's reading of *Edwards*. In *United States v. Hall, supra*, the *Edwards* issue arose in the context of reinterrogation on a charge

(Footnote continued)

apparently found the rule simple to understand and easy to apply and alleged violations of *Edwards* have been rare.[13]

In the end, the proposed new rule is nothing but a thinly-veiled attempt to shift the burden of knowing and following the law from the police to the accused, thus leaving the police in a position to exploit the absence of counsel. *See Smith v. Illinois*, 469 U.S. at 98 (absent bright-line protection, police may exploit subtle distinctions in the law to persuade an accused to incriminate himself). The proper result is simple: because the *Edwards* rule is not broken, the invitation to fix it should be declined.[14]

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other than the one for which the accused invoked his Fifth Amendment right to counsel. As to the initial charge of escape, regarding which the accused had counsel, the court stated that "Hall's fifth amendment right against self-incrimination was protected." *Id.* at 963. In *United States v. Halliday*, *supra*, the FBI agents contacted the person they believed to be the accused's attorney for permission to reinterrogate the accused. The attorney, although not yet the attorney of record, indicated he had no objection but referred the agents to the attorney of record. Rather than do that, the agents obtained the accused's acknowledgment that the first attorney was his lawyer, that he did not want counsel appointed, and that he would waive his rights.

[13] The United States makes the unsupported assertion that if a cost-benefit analysis is applied, the proposed new rule should supplant *Edwards* in the interest of extracting more confessions. The reality is that statistical data on the effect of *Miranda* show no impairment to obtaining convictions. *See* Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435, 460 (1987) ("[t]he failure to turn up evidence of at least some negative impact [of *Miranda*] provides a striking demonstration of the paucity of such evidence and in effect strongly reinforces the prevailing wisdom that *Miranda* has not posed a significant barrier to effective police work").

[14] Contrary to the United States' belief (U.S. *Amicus* Br. at 14-16), lower courts have had little difficulty comprehending and applying *Edwards*. *E.g.*, *New Hampshire v. Dedrick*, 564 A.2d 423, 433 (N.H. 1989) (Thayer and Souter, JJ., dissenting), *cert. denied*, 110 S. Ct. 1305 (1990):

> "[T]he Supreme Court has consistently recognized the value of a prophylactic 'bright-line' prohibition of police-initiated questioning after the defendant has invoked his right to counsel. *See, e.g., Smith v. Illinois*, 469 U.S. 91, 98, 105 S. Ct. 490, 494, 83 L. Ed. 2d 488 (1984); *Oregon v. Bradshaw*, 462 U.S. 1039, 1044, 103 S. Ct. 2830, 2834, 77 L. Ed. 2d 405 (1983); *Edwards v. Arizona*, 451 U.S. 477, 486 n.9, 101 S. Ct. 1880, 1885 n.9, 68 L. Ed. 2d 378 (1981) (following a request for counsel, the accused and not the police must reopen dialogue with the
>
> *(Footnote continued)*

II. MINNICK'S CONVICTION WAS OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT

A. The Sixth Amendment Issue Is Properly Before This Court

Mississippi maintains that Minnick's petition for *certiorari* did not raise a claim under the Sixth Amendment, that Minnick's arguments rooted in the Sixth Amendment are presented for the first time in his brief on the merits and that they thus should not be considered (Miss. Br. at 40). To the contrary, Minnick's Sixth Amendment arguments that his conviction is invalid were made throughout this case: at trial (R. 347-48) and on direct appeal (Appellant's Brief to Mississippi Supreme Court, "Appellant's Br.," at 1, 12-14; Reply Brief of Appellant at 1-3; Appellant's Supplemental Brief at 2, 6-17).

The Question Presented in Minnick's petition for *certiorari* explicitly refers neither to the Fifth nor Sixth Amendment. Encompassing both amendments – in the context of a petition from a ruling which dealt with both amendments – it stated:

> "Whether, once an accused has expressed his desire to deal with law enforcement officers only through counsel, the police may reinitiate interrogation in the absence of counsel as soon as the accused has completed one consultation with a lawyer?"[15]

The Question Presented in Minnick's brief on the merits is not a verbatim quotation of that found in his petition for *certiorari*.

> authorities). Absent such a rule, the police 'through "badger[ing]" or "overreaching" – explicit or subtle, deliberate or unintentional – might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance.' *Smith v. Illinois*, *supra* (quoting *Oregon v. Bradshaw*, *supra*)."

See also Neuschafer v. McKay, 807 F.2d 839, 840 (9th Cir. 1987) (per Kennedy, J.) ("after he requested a lawyer and none was provided . . . [u]nder *Edwards*, Neuschafer's confession was illegally obtained unless, first, he initiated the interview that led to the confession and, second, knowingly and intelligently waived his right to counsel"; remanding case for determination on the initiation issue).

[15] Similarly, the United States puts the Question Presented as: "Whether law enforcement officers may reinitiate custodial interrogation after a suspect has invoked his right to counsel and consulted with a lawyer" (U.S. *Amicus* Br. at I).

But it neither "raise[s] additional questions" nor "change[s] the substance of the questions already presented," Sup. Ct. R. 24.1(a). Furthermore, "phrasing of the questions presented [in the petition and the brief on the merits] need not be identical." *Id.* Indeed, it is entirely proper to rephrase points in order to state them more clearly or accurately.

The rationale for limiting review to "[o]nly the questions set forth in the petition [for *certiorari*], or fairly included therein," Sup. Ct. R. 14.1(a), was made clear by this Court's admonishment that it "disapprove[s] the practice of smuggling additional questions into a case after [the Court] grant[s] *certiorari*." *Irvine v. California*, 347 U.S. 128, 129 (1954). No such "smuggling" has occurred here, nor was any intended. In fact, Mississippi's argument is more than a bit disingenuous. The State well understood the purport of the petition for *certiorari* upon its receipt. Its own restatement of the issues raised by the petition in its brief opposing the grant of a writ read as follows: "Petitioner's Fifth and Sixth Amendment rights were not violated by the admission of his confession into evidence" (Brief in Opposition to Petition for *Certiorari* at i). Its own brief in opposition to the petition for *certiorari* addressed the issue on the merits (*id.* at 6-15). Moreover, the Sixth Amendment issue had been – as Mississippi has acknowledged to this Court – passed upon by the Mississippi Supreme Court (Miss. Br. at 42, 48 n.15; JA 77). Minnick's petition for review encompassed a Sixth Amendment claim, which should be considered on the merits by this Court.

B. *Michigan v. Jackson* Mandates Reversal of Minnick's Conviction

In *Michigan v. Jackson*, 475 U.S. 625 (1986), this Court transposed the prophylactic rule of *Edwards* to reinitiation of interrogation once the Sixth Amendment attached and the accused asserted his right to counsel. *See also Michigan v. Harvey*, 110 S. Ct. 1176, 1180 (1990). For the same reasons Mississippi's position offends the Fifth Amendment under *Edwards*, it violates the Sixth Amendment because it would allow police to reinitiate interrogation without counsel present throughout critical pretrial stages, indeed, even up to the time

of trial itself.[10] Once the Sixth Amendment right to counsel attaches the government is precluded from making any attempt to elicit information from the accused without the presence of counsel or a valid waiver of the right to have counsel present. *Maine v. Moulton*, 474 U.S. 159, 176 (1985) ("Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent"); *Brewer v. Williams*, 430 U.S. 387, 401 (1977) ("once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him"); *Massiah v. United States*, 377 U.S. 201, 206 (1964) (Sixth Amendment violated by introduction of defendant's incriminating statements "which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel"). *See also Michigan v. Jackson*, 475 U.S. at 630.[11]

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[10] As noted by Justice Robertson dissenting below:

> "[I]magine this scenario. The day before trial the district attorney, or some representative of the prosecution force, . . . visits Minnick in his jail cell. This is done without so much as a 'By your leave' or 'Kiss my foot' to Minnick's lawyer. The district attorney says, 'Mr. Minnick, your trial begins tomorrow, and there are a few points I want to clear up before the trial begins.' Assume then that the district attorney . . . reads Minnick the standard *Miranda* warnings and without obtaining any express acknowledgment or waiver, written or oral, proceeds to ask Minnick questions, to which Minnick responds." (JA 114)

Nothing in the interpretation offered by Mississippi or in the rule proposed by the United States would preclude this scenario.

[11] The United States argues that the *Edwards* rule is only necessary to prevent coercion during custodial interrogation where the accused has requested, but not yet been afforded, the opportunity to consult with counsel (U.S. *Amicus* Br. at 10-12). The effort of the United States to restrict *Edwards* effectively asks the Court to undo *Jackson*. The bright-line rule enunciated by the Court in *Jackson* is not limited to situations involving incarceration, an unrepresented defendant, or even custodial interrogation. *Michigan v. Harvey*, 110 S. Ct. at 1177 (involving a defendant already represented by counsel). *See also Maine v. Moulton*, 474 U.S. at 176 (accused out on bail and already represented by and had consulted with counsel); *Massiah v. United States*, 377 U.S. at 202 (involving a defendant who was out on bail and had retained a lawyer).

The *Jackson* rule protects the accused's express desire to rely on counsel in dealing with the state and sets forth the state's "affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking [the right to counsel]." *Maine v. Moulton*, 474 U.S. at 176. The holding in *Jackson* that once an accused expresses his desire to have the assistance of counsel, "the authorities' interview with him would have stopped, and further questioning would have been forbidden (unless petitioner called for such a meeting)" was reaffirmed in *Patterson v. Illinois*, 487 U.S. 285, 291 (1988). Mississippi's restrictive interpretation of *Edwards* — and therefore *Jackson* — would negate the states' obligation to honor the accused's request for counsel at the same time it destroys the bright-line rule of *Jackson*.

Mississippi's argument that the Sixth Amendment was not violated because Minnick "knowingly, intentionally and voluntarily" waived his right to counsel (Miss. Br. at 48 n.15) is not serious. The argument deals with *Jackson*, *Harvey* and like precedents by simply ignoring them. Deputy Denham's reinitiation of interrogation after Minnick requested counsel violated the rule of *Jackson*; thus Minnick could not, as a matter of Sixth Amendment law, be deemed to have waived his right to counsel. The Mississippi Supreme Court thus committed plain error in conducting a traditional waiver analysis in light of the *Jackson* violation. There should have been no further inquiry.

C. Minnick's Sixth Amendment Right To Counsel Attached Before Deputy Denham Reinitiated Interrogation

Mississippi now attempts to retract its concession below that Minnick's Sixth Amendment right to counsel attached prior to Deputy Denham's interrogation (JA 68), as well as to take issue with the ruling to that effect of the Mississippi Supreme Court (JA 76).[18] Mississippi and the United States would impose upon

[18] Mississippi would have this Court believe that it intended to admit only that Minnick's right to counsel had attached under the *Mississippi* Constitution (Miss. Br. at 46 n.14). What Mississippi stipulated to below, however, was that it was "evident that under Mississippi law, Minnick's Sixth Amendment right to counsel had attached at the time of the interview" (JA 68). The only "Sixth Amendment" either the State or its Supreme Court could have been referring

(Footnote continued)

the states a unified federal definition of the *procedural* point at which state adversarial proceedings commence, and an accused's Sixth Amendment right to counsel attaches (Miss. Br. at 45-48; U.S. *Amicus* Br. at 18-22). These arguments misconstrue this Court's precedents and ignore repeated pronouncements of the Mississippi Supreme Court.

It is settled — and we do not dispute — that the ultimate determination of when the Sixth Amendment right to counsel attaches is a matter of federal law. In defining the point of attachment, this Court held in *Kirby v. Illinois*, 406 U.S. 682, 688 (1972) (plurality), that the "Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated." That determination, however, is in turn governed by the answer to the question of when, under applicable state or federal law, "adversary judicial proceedings" have in fact commenced.[19]

It is the law of Mississippi that determines the point at which the State initiated adversary proceedings against Minnick and, consequently, the point at which Minnick's Sixth Amendment

to was federal; Mississippi's right to counsel is embodied in Art. 3, Sec. 26 of its Constitution.

Below, Minnick raised issues under both the Sixth Amendment of the United States Constitution and the Mississippi Constitution. *See* Appellant's Br. at 1, 12-14 and Appellant's Supplemental Br. at 6-9. Indeed, Mississippi explicitly recognized this dual constitutional appeal. *See* Brief for Appellee to the Mississippi Supreme Court at 2.

[19] *Kirby* notes that formal adversary proceedings may take the form of "formal charge, preliminary hearing, indictment, information, or arraignment." 406 U.S. at 689. This recognizes that procedures for commencing adversary proceedings vary according to state laws. *United States ex rel. Dove v. Thieret*, 693 F. Supp. 716, 720 (C.D. Ill. 1988) ("[s]ince the mechanisms of criminal prosecution vary from state to state, the Supreme Court has not defined the exact point at which a prosecution is initiated"). *See also Jimpson v. Mississippi*, 532 So. 2d 985, 988 (Miss. 1988) (*Kirby* and *Brewer* "suggest that the Court look to the state procedure to determine when formal adversarial proceedings have been initiated"); *Nicholson v. Mississippi*, 523 So. 2d 68, 74 (Miss. 1988) (start of adversary proceedings "may be at formal charge, preliminary hearing, indictment, information, or arraignment, according to *Kirby*, implying that the states must determine, within the context of their criminal justice systems, how early that point will be").

right to counsel actually attached. *See Moore v. Illinois*, 434 U.S. 220, 228 (1977) (examining Illinois law to determine purpose of preliminary hearing and whether accused was entitled to counsel); *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (examining Alabama law to determine whether preliminary hearing was critical stage and triggered Sixth Amendment right to counsel); *White v. Maryland*, 373 U.S. 59, 60 (1963) (*per curiam*) (examining Maryland law to determine when Sixth Amendment attached); *Hamilton v. Alabama*, 368 U.S. 52, 53-55 (1961) (examining Alabama law to determine whether Sixth Amendment right to counsel attached at arraignment). *See also Corley v. Mississippi*, 536 So. 2d 1314, 1317 n.1 (Miss. 1988) ("[t]he correct reading of federal law is that the Sixth Amendment right to counsel attaches in a state criminal prosecution whenever *under state law* the criminal process is deemed begun").[20]

As noted in Minnick's opening brief, Mississippi law provides that "[a] prosecution may be commenced . . . by the issuance

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[20] Lower federal courts have deferred to state court and statutory determination of when a state's formal adversarial process against the accused commences and the Sixth Amendment right to counsel attaches. *E.g., Meadows v. Kuhlmann*, 812 F.2d 72, 76-77 (2d Cir.) (New York law setting filing of complaint and issuance of arrest warrant as beginning of criminal action governs Sixth Amendment analysis), *cert. denied*, 482 U.S. 915 (1987); *Felder v. McCotter*, 765 F.2d 1245, 1247-48 (5th Cir. 1985) (under Texas law "[t]he filing of an affidavit and criminal complaint in a Justice of the Peace court constitutes the institution of formal judicial criminal proceedings" for Sixth Amendment right to counsel purposes), *cert. denied*, 475 U.S. 1111 (1986); *United States ex rel. Sanders v. Rowe*, 460 F. Supp. 1128, 1139 (N.D. Ill. 1978) ("a federal court will defer to a state statute or opinion fixing the time that adversary judicial proceedings commence, if the time chosen is prior to that required by *Kirby*"); *United States ex rel. Burton v. Cuyler*, 439 F. Supp. 1173, 1179 (E.D. Pa. 1977) (determination of when adversary judicial proceedings begins depends "not only on the facts of the given case, but also upon the law of the jurisdiction in which the facts arose"), *aff'd without opinion*, 582 F.2d 1278 (3d Cir. 1978).

Many federal constitutional rights of state criminal defendants require application of state procedural law and are designed to operate in "the context of the criminal processes maintained by the American States." *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968). This Court has recognized that it "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson v. New York*, 432 U.S. 197, 201 (1977). *Accord McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986).

of a warrant, or by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit." Miss. Code Ann. § 99-1-7 (1972). The Mississippi Supreme Court has repeatedly held that Mississippi adversary proceedings commence upon the issuance of an arrest warrant, as the State concedes here (Miss. Br. at 42-43).[21] In response to this, Mississippi and the United States argue that an arrest cannot mark the point of attachment in the federal system (Miss. Br. at 48; U.S. *Amicus* Br. at 19, 20 n.11).[22] But Mississippi and the United States fail to perceive that the authority on which they rely applies only to federal, and not state, convictions.[23] Indeed, the distinction between federal and state prosecutions was explicitly recognized in one case, *United States v. Pace*, 833 F.2d 1307, 1312 n.3 (9th Cir. 1987), *cert. denied*, 486 U.S. 1011 (1988), cited by the United States (U.S. *Amicus* Br. at 20 n.11). The *Pace* court held:

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[21] Mississippi acknowledges to this Court that "The Mississippi Supreme [*sic*] held in *Livingston v. State*, 519 So. 2d 1218 (Miss. 1988), that the right to counsel in the Sixth Amendment sense attaches at the time an arrest warrant is issued" (Miss. Br. at 42-43). *See also Jimpson v. Mississippi*, 532 So. 2d at 988; *Nicholson v. Mississippi*, 523 So. 2d at 74.

[22] Arguing in the alternative, Mississippi and the United States also assert that an arrest pursuant to a warrant issued in Mississippi does not indicate a commitment by the State to prosecute (Miss. Br. at 47-48; U.S. *Amicus* Br. at 20-21). This argument is flatly contradicted by Mississippi statute, Miss. Code Ann. § 99-1-7 (1972), and repeated holdings of the Mississippi Supreme Court. *E.g., Page v. Mississippi*, 495 So. 2d 436, 440 (Miss. 1986).

[23] All but one of the cases cited by Mississippi and the United States involve convictions based on federal law, and thus have no bearing on whether state law determines the point at which an adversary criminal proceeding begins. *United States v. Gouveia*, 467 U.S. 180 (1984), cited by Mississippi and the United States, involved consolidated appeals of convictions based on federal law. *United States v. Pace*, 833 F.2d 1307 (9th Cir. 1987), cited by the United States, was also an appeal of a federal conviction as was *United States v. Guido*, 704 F.2d 675 (2d Cir. 1983). *Judd v. Vose*, 813 F.2d 494 (1st Cir. 1987) was an appeal from a judgment denying a habeas corpus petition, and involved a conviction under Massachusetts law. There, the court held consistent with Massachusetts law, which provides that adversary judicial proceedings commence with the filing of an indictment or complaint (Mass. Ann. Laws ch. 263, § 4 (Law. Co-op. 1980 & Supp. 1990)), that appellant's Sixth Amendment right to counsel did not attach upon arrest.

> "[b]ecause prosecution under *state* law is commenced at different times depending upon the criminal procedure statutes of the particular state, we limit our holding to federal criminal prosecutions." (citing *Moore v. Illinois*, 434 U.S. 220 (1977))

The United States additionally asserts that "[t]here is nothing unique about Mississippi's criminal procedure that would justify holding that the Sixth Amendment right to counsel attaches at the time an arrest warrant is issued" (U.S. *Amicus* Br. at 20). The Mississippi Supreme Court, however, has, in evaluating a Sixth Amendment claim, determined that the point at which adversary proceedings commence is designed to address unique characteristics of Mississippi procedure:

> "Application of [the federal] approach to our state constitutional right to counsel would be wholly unworkable. With grand juries meeting infrequently in many of our rural counties, such an approach would have the right to counsel available to the accused only after many months had passed following arrest. We also take note of the practice in many of our counties of postponing arraignment in order to avoid the impact of our 270 day rule. Miss. Code Ann. § 99-17-1 (Supp. 1985). Adherence to the recently stated federal approach to the right to counsel would, simply put, have the effect of providing that the accused had the right to counsel only after it could be said with reasonable certainty that it would no longer do him any good, *i.e.*, after the point where any competent law enforcement officer would long since have obtained a confession or other inculpatory statement." *Page v. Mississippi*, 495 So. 2d at 440 n.5.

Indeed, *amicus* the Mississippi State Bar notes "that under Mississippi's understanding of its criminal process, Minnick's Sixth

Amendment right to counsel had attached by the time of Denham's interrogation." *See* Brief *Amicus Curiae* of the Mississippi State Bar dated September 13, 1990 at 5.[24]

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[24] Mississippi's final, make-weight argument is that the decision below only addressed the right to counsel under the Mississippi Constitution (Miss. Br. at 42-47). It is clear, however, that the Mississippi Supreme Court's decision addressed the federal right to counsel, or, at the very least, encompassed both the state and federal rights. The decision below consistently refers to the right to counsel at issue as the "Sixth Amendment right to counsel" (JA 76-80). Mississippi's right to counsel, as we have previously observed, is not to be found in any provision labeled "Sixth Amendment," but in Article 3, Section 26 of its Constitution. Nowhere does the court cite to the Mississippi right to counsel provision. *See* JA 76-80. In any case, the Mississippi Supreme Court has made clear that its determination of when adversary proceedings commence applies to both the federal and state rights to counsel. *E.g.*, *Jimpson v. Mississippi*, 532 So. 2d at 988 (construing both federal and state right to counsel provisions); *Livingston v. Mississippi*, 519 So. 2d 1218, 1220 (Miss. 1988) (construing both federal and state right to counsel provisions).

CONCLUSION

The judgment affirming Minnick's conviction should be reversed.

Dated: New York, New York
September 27, 1990

Respectfully submitted,

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